

NOT FOR PUBLICATION

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN
APPELLATE DIVISION

SAMUEL MOSES,)
)
)
 Petitioner,)
)
 concerning)
) D.C. Civ. App. No. 2004-94
 HON. IVE A. SWAN,)
) Re: Super. Ct. Crim. No. 2000-328
 Respondent,)
)
 and)
)
 GOVERNMENT OF THE VIRGIN ISLANDS,)
)
 Nominal Respondent.)
)
)
 _____)

Petition for Writ of Mandamus to the Superior
Court of the Virgin Islands

Considered: September 23, 2005
Decided: December 16, 2005

BEFORE: **RAYMOND L. FINCH**, Chief Judge of the District Court of the Virgin Islands; **CURTIS V. GÓMEZ**, Judge of the District Court of the Virgin Islands; and **PATRICIA D. STEELE**, Judge of the Superior Court, Division of St. Croix, sitting by designation.

APPEARANCES:

David J. Comeaux, Esq.
St. Thomas, U.S.V.I.
For petitioner

Verne A. Hodge, Jr., Esq.
St. Thomas, U.S.V.I.
For nominal respondent

MEMORANDUM OPINION

Petitioner Samuel Moses requests that this Court enter an order directing the Superior Court to dismiss the criminal charges against him for want of prosecution or for unconstitutional delay. In the alternative, Moses requests that this Court issue an order directing the Superior Court trial judge to resolve his outstanding motions or order the trial judge to enter rulings sufficiently in advance of trial to allow him to prepare a defense.

I. FACTUAL BACKGROUND AND OVERVIEW

On August 15, 2000, the Government of the Virgin Islands filed an information in the Superior Court of the Virgin Islands, charging petitioner Samuel Moses with two counts of first degree rape, in violation of V.I. Code Ann. tit. 14, § 1701, and one count of aggravated assault and battery, in violation of 14 V.I.C. § 298(5). Moses has yet to be tried on these charges. Moses argues in his petition for writ of mandamus that since the government filed its information more than five years ago, neither the Superior Court nor the government has adequately guided this matter toward resolution. In particular, the factual predicate of Moses' petition is that the Superior Court has been

dilatory in ruling on several of his motions and otherwise forcing this matter to trial.

While the case has been pending, Moses has been restricted from leaving the Virgin Islands. Because of this, he has had to postpone his education and forego a specific higher-paying job. [Pet. for Writ of Mandamus, Ex. A at 9.] For the last five years, his work schedule has been limited because he must check in with probation multiple times per week.¹ [Id.] Moses also notes that his anxiety and "stress [are] physically manifested and evidenced by the fact that he has lost fifty pounds since his arrest." [Pet. for Writ of Mandamus, Ex. A at 9.]

Moses complains that he has filed at least ten motions seeking dismissal, suppression, and the like, and that none of them have been resolved. [Petr.'s Br. at 1.] He states that the Government has failed to respond to most of the motions as well. [Id.]

The trial judge filed a Notice of Special Appearance and Motion to Dismiss Petition in response to Moses' petition. In summary, the response states that all but recently filed motions have been resolved through his rulings from the bench. [Mem. in

¹ For the first four years after his arrest, until August 14, 2004, he was forced to check in with probation every day. He made a motion to modify this condition of release in August 2001 and again in May 2003 but it was not granted until August 2004. Now he must check in twice per week.

Support of Respt.'s Mot. to Dismiss at 3-4; hereinafter "Resp't Mem."] The trial judge also states that the delay in bringing the matter to trial is not the result of his inaction but, instead, is due to "the fact that only recently were the serological and scientific evidence submitted to the [FBI] for testing, including the results of a rape kit." [*Id.* at 3.] It appears that the evidence was submitted to the FBI lab on July 21, 2004. [Notice of Updated Super. Ct. R. at 4.]

We have reviewed the trial docket submitted by the Superior Court in an attempt to ascertain what actually happened below. Unfortunately, the record is unclear and the docket appears incomplete and some of the dates seem inaccurate. For example, the docket lists only one entry between January 24, 2005, and June 1, 2005, but Moses has provided copies of two motions filed and date stamped by the Superior Court as well as three orders issued during that time signed by the trial judge. [Petr.'s Notice of Updated Super. Ct. R. at 1-2.] Given these limitations, we have attempted to create a chart indicating what may have happened.

Table: List of Disputed Motions Filed by Defendant

Date Motion Was Filed:	Title of Motion:	Status of Motion:	If resolved, date and result of disposition:
10/05/00	Motion For Production of 911 Tapes and Central Dispatch Logs	Pending	N/A
08/08/01	Motion to Modify Conditions of Release	Resolved	Orally denied on 09/30/02.
08/08/01	Motion to Dismiss or in the alternative Suppress Evidence As Discovery Sanction	Resolved	Orally denied motion to dismiss on 09/30/02; then defendant's counsel said all discovery issues had been addressed.
10/31/01	Motion to Deem Motion to Dismiss Conceded	Resolved	Orally denied on 09/30/02.
03/06/03	Renewed Motion to Dismiss, or in Alternative, to Suppress Evidence	Pending	N/A
05/13/03	Motion to Modify Conditions of Release	Moot	Granted similar motion on 08/14/04.
06/22/04	Motion to Dismiss for Unconstitutional Delay and for Want of Prosecution	Pending	N/A
06/30/04	Emergency Motion to Quash Search Warrant	Resolved	Denied 08/27/04.
07/02/04	Motion for Hearing On Emergency Motion to Quash Search Warrant, or in the Alternative Suppress Evidence	Pending	Granted motion for hearing on 08/09/04. Denied Motion to quash in 08/27/04 order. Did not address alternative motion.
08/13/04	Unopposed Motion to Modify Conditions of Release	Resolved	Granted in 08/14/04 order.
06/03/05	Renewed Motion to Dismiss	Pending	N/A

Aside from the information summarized above, we also note that trial in this matter has been delayed on several occasions.

It seems that the original trial date was set for August 9, 2004,² but on July 30, 2004, the Government sought a continuance of the trial date "because the FBI laboratory analysis of Mr. Moses' bodily samples was still unavailable." [Notice of Updated Super. Ct. R. at 4.] The trial court set a new trial date of October 25, 2004, but because the FBI laboratory results were still not available, the trial was rescheduled for July 25, 2005. Although the docket from the Superior Court does not indicate, we have discovered that once again the trial was postponed and no new trial date has been set.

In sum, it seems that at least three of the Petitioner's motions have not been addressed at all, including the June 22, 2004, Motion to Dismiss for Unconstitutional Delay and for Want of Prosecution.

II. JURISDICTION

As a court with potential appellate jurisdiction over the underlying matter pending before the Territorial Court, this Court has authority to consider and determine petitions for writs of mandamus to the judges of the Superior Court. See The Omnibus Justice Act of 2005, Act No. 6730, § 54 (amending Act No. 6687 (2004), which repealed V.I.C. §§ 33-40, and reinstating appellate

² There is nothing on the record to indicate why it took so long to set a trial date.

jurisdiction in this Court); see also *In re Richards*, 213 F.3d 773, 780 (3d Cir. 2000).

Before this Court can exercise its mandamus jurisdiction, however, the petitioner must complete service of his petition in accordance with Rule 13 of the Virgin Islands Rules of Appellate Procedure. The trial judge argues that this Court has no jurisdiction over this petition because Moses failed to properly serve him and the clerk of the Superior Court, as required by Rule 13. In support of his argument, the trial judge has provided an exhibit which purports to show that service was improper. [Resp't Mem., Ex. 1.] A review of this exhibit, however, reveals that it does not support the respondent's claim of improper service. The exhibit is a signature page and certificate of service of a motion to dismiss that the petitioner filed in the underlying matter in Superior Court. [Compare Resp't Mem., Ex. 1 with Pet. for Writ of Mandamus, Ex. A at 11.] A review of Moses' petition shows that he has in fact provided proper service to the respondent and clerk of the Superior Court in compliance with Rule 13. [Pet. for Writ of Mandamus at 8.] Thus, the trial judge's argument that we lack jurisdiction to consider this mandamus petition must fail.

III. ANALYSIS

It is well recognized that a writ of mandamus is an extraordinary remedy, only to be issued in "exceptional circumstances amounting to a judicial 'usurpation of power.'" *Citibank, N.A. v. Fullam*, 580 F.2d 82, 86 (3d Cir. 1978) (quoting *Will v. United States*, 389 U.S. 90, 95 (1967)). For a writ of mandamus to be issued, the petitioner must show "no other adequate means to attain the desired relief, and ... a right to the writ [that] is clear and indisputable." *In re Patenaude*, 210 F.3d 135, 141 (3d Cir. 2000).

Moses has no other adequate means to get relief because the trial judge and the government may continue to ignore Moses' motions in the absence of any action from this Court. Moses has already filed multiple motions to dismiss for unconstitutional delay but after more than a year, the trial court has yet to acknowledge them. Moses is unable to appeal decisions before they are made.

Moses asserts two bases for a clear and indisputable right to relief. First, Moses argues the alleged inactivity of the trial court has infringed upon his Sixth Amendment right to a speedy trial. Moses is correct that the Sixth Amendment

guarantees a right to a speedy trial.³ *Barker v. Wingo*, 407 U.S. 514, 515 (1972); see also *Gov't of the V.I. v. Pemberton*, 813 F.2d 626 (3d Cir. 1987). However, "[n]o per se test has been devised to determine when the right to a speedy trial has been violated." *United States v. Williams*, 782 F.2d 1462, 1465 (9th Cir. 1985). Instead, in weighing any speedy trial claim, the following four factors are considered: (1) length of delay; (2) reason for delay; (3) defendant's assertion of his right; and (4) prejudice to the defendant. *Barker*, 407 U.S. at 530-31; *United States v. Dreyer*, 533 F.2d 112, 114-15 (3d Cir. 1976). In this balancing test, no one factor is "a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial." *Barker*, 407 U.S. at 533.

Second, Moses seeks relief under Federal Rule of Criminal Procedure 48(b)(3). Rule 48(b)(3) states "The court may dismiss an indictment, information, or complaint if unnecessary delay occurs in bringing a defendant to trial."⁴

³ The Sixth Amendment right to a speedy trial applies in the Virgin Islands per section 3 of the Revised Organic Act, 48 U.S.C. § 1561. See, e.g., *Gov't of the V.I. v. King*, 25 V.I. 114, 117 (Terr. Ct. 1990).

⁴ The Rules of the Superior Court provide that practice in that court "shall be governed by the Rules of the [Superior] Court and, to the extent not inconsistent therewith, by the ... Federal Rules of Criminal Procedure...." Super. Ct. R. 7. As there is no Superior Court rule governing the dismissal of a case for unnecessary delay, Rule 48(a) of the Federal Rules of

Moses' case may be ripe for a writ to issue. However, given the absence of a clear record in this case, we decline to issue a writ at this time. While we remain concerned that Moses' case still remains pending after five years, we expect the Superior Court to resolve the issue shortly. Thus, the denial of mandamus relief is without prejudice to a renewed application if the Superior Court does not rule on the pending motions regarding Moses' speedy trial and due process rights within sixty days of the date of this order.

ENTERED December 16, 2005.

ATTEST:
Wilfredo F. Morales
Clerk of Court

by: _____
Deputy Clerk

Copies (with accompanying order) to:

Hon. Curtis V. Gómez	Hon. Raymond L. Finch
Hon. Patricia D. Steele	David J. Comeaux, Esq.
Verne A. Hodge, Jr., Esq.	Lydia Trotman
Carol Jackson	Olga Schneider
Kim Bonnell	Kendra Nielsam
Clerk of the Superior Court	

Criminal Procedure governs here.

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David J. Comeaux, Esq.
St. Thomas, U.S.V.I.
For petitioner

Verne A. Hodge, Jr., Esq.
St. Thomas, U.S.V.I.
For nominal respondent

ORDER

Per Curiam.

For the reasons stated in the accompanying memorandum of even date, it is hereby

ORDERED that the petition for a writ of mandamus is denied.

SO ORDERED this 16th day of December, 2005.

ATTEST:
WILFREDO F. MORALES
Clerk of the Court

By: _____
Deputy Clerk

Copies (with accompanying memorandum) to:

Hon. Curtis V. Gómez
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